Military Whistleblower Protection Act

Whistleblower Investigations

Title 10, United States Code, Section 1034

U.S. Army Inspector

Enabling Learning Objectives

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Whistleblower Investigations

- **Describe the four categories of Whistleblower complainants**
- **Describe the agency authorized to receive Whistleblower allegations**
- **Identify what agency is responsible for investigating reprisal allegations for each complainant category**
- **Describe the four questions (or factors) that establish the framework for an investigation into an allegation of Whistleblower reprisal**

WBR Standards / References

- **10 USC 1034**
- **DoD Directive 7050.6**
- **DoD Directive 1401.3**
- **AR 20-1, paragraph 8-10**
- **AR 600-20**

- **www.dtic.mil/whs/directives**

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Categories of Employees

- **Military Member** Active Duty, Reserve, and National Guard (Federal Interest)
- **Non-Appropriated Fund (NAF) Civilian**
  e.g. AAFES / MWR Employees
- **Appropriated Fund Civilian**
  General Schedule
- **Contractor Employee**
  e.g. Kellogg, Brown, & Root

Military and NAF Civilian Reprisal Complaints

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Whistleblower Investigations

- **Any IG may receive the complaint**
- **IG, DoD, has oversight of Service reprisal investigations**
- **Military member has the right to appeal directly to the Secretary of Defense**

Appropriated Fund Civilian
Reprisal Complaints

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Whistleblower Investigations

- **Office of Special Counsel (OSC)**
- **www.osc.gov**
- **U.S. Office of Special Counsel**
  1730 M Street, N.W., Suite 201
  Washington, D.C. 20036-4505
  Tel: (800) 572-2249 or (202) 653-9125

DoD Contractor
Reprisal Complaints

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Whistleblower Investigations

IG, DoD

U.S. Army Inspector

Categories of Employees

- **Military Member**

Any IG can receive – IG DoD oversight

- **Non-Appropriated Fund (NAF) Civilian**

Any IG can receive – IG DoD oversight

- **Appropriated Fund Civilian**

Refer to Office of Special Counsel – Assistance

- **Contractor Employee**

Refer to IG DoD - Assistance

Revisions to 10 U.S.C. 1034

Whistleblower Investigations

- **DoDD 7050.6, dated 23 June 2000**
- **Service IGs authorized to receive Military Members' reprisal complaints and investigate *with DoD oversight***
- **Formalized preliminary analysis (PA)**
  - **Conducted at MACOM level for Army**
- **Deleted unnecessary administrative requirements:**
  - **90 days to complete investigations (now 180 days)**
  - **Provide complainants supporting documents and summarized testimony (only ROI unless specifically requested)**
  - **Post-disposition interviews**

Revisions to 10 U.S.C. 1034

- **DoDD 1401.3, dated 16 October 2001**

- **Service IGs authorized to receive NAF Civilian reprisal complaints**

Timing

- **Complaint must be made within 120 days after the date the member became aware of the personnel action**
- **Notify DAIG (Assistance Division) within two working days**

The Four Questions

ELO

- **Protected communication?** Yes
- **Unfavorable personnel actio** Yes
- **Management knowledge?** Yes
- **Independent basis for action** No

REPRISAL!

Question One:

Did the complainant make or prepare a communication protected by statute?

Protected Communication

- **What was the protected communication?**
- **To whom was it made?**
- **When was it made?**

Protected Communication First Category

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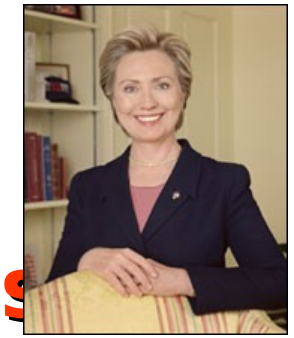
Any lawful communication to:



- **Members of Congres**
- **Inspectors General**

- ***Regardless of subject***

Protected Communication: Second Category

Lawful communications *made to:*

- **DoD audit, inspection, investigation, or law enforcement agencies**
- **People or organizations designated under component regulations (AR 600-20) or established administrative procedures to receive such communications.**

Protected Communication: Second Category (cont'd)

Protected only if the communications concern:

- **Violations of law or regulation (includes EO issues)**
- **Gross mismanagement**
- **Abuse of authority**
- **Gross waste of funds or resources**
- **Substantial danger to public health or safety**

Reasonably believed to be true!

Protected Communication

Whistleblower Investigations

Protected communications may be:

- **Verbal, written, or electronic (telephone, fax, E-mail)**
- **Made by a third party**

Chain of command communications may include:

- ***Complaints made during commander's office hours, request mast, or open-door policy***
- ***Complaints made in public forum (Commander's Call)***

Protected Communication

Whistleblower Investigations

Timing:

- **Date the communication occurred is critical**
  - **Preparing, drafting, rumors of a PC**
  - **Preparing to complain:**
    - **"I'm going to write my congressman"**
    - **"I'm fixin' to see the IG about this"**
    - **"I'm going to tell the old man about these safety violations the platoon sergeants are ordering us to do."**

Protected Communication

Timing:

- **Give the benefit of the doubt**
  - **Responsible official's belief that the member intended to make, or may have made, a protected communication.**
    (No actual communication is necessary)

PERCEPTION = REALITY

Protected Communication?

- **CPL Hildan says she was reprised against because she announced at a recent Commander's Call that her supervisor discriminated against her because of her religious beliefs.**

- **COL Klink claims he suffered reprisal because his commander believes he was the source of an anonymous call to the IG (COL Klink denies he ever contacted the IG).**

Protected Communication ?

- **CPT Kirk alleges he was reprised against because his mother wrote the DoD Hotline and complained that he was being sent on overseas deployments more than anyone else in his unit.**

- **SPC Shea claims his supervisor reprised against him because he wrote a letter to his Congressman requesting that a National Park be named in honor of Jerry Garcia.**

Question Two:

Was an <u>unfavorable personnel action taken</u>

<u>or threatened,</u>

or was a

<u>favorable personnel action</u>

<u>withheld or threatened to be withheld</u>

following the protected communication?

Personnel Action

- **What is an unfavorable personnel action?**

Any action that affects,
or has the potential to affect,
a Service Member's position or career.

Personnel Action

Whistleblower Investigations

- **Performance evaluations**
- **Transfer or reassignment**
- **Changes to duties or responsibilities**
- **Disciplinary or other corrective actions**
- **Denial of reenlistment**
- **Separation proceedings**
- **Decisions concerning awards, promotions, or training**
- **Decisions concerning pay or benefits**
- **Referrals for Mental Health Evaluation (MHE)**

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Personnel Action

Unfavorable personnel action may include:

- **Actions taken as a result of an investigation (does not include initiation of an investigation)**
- **Revocation of:**
  - **Security clearance**
  - **Authorization to carry weapons**
  - **Flying status**
  - **Personnel Reliability Program certification**

Key: Was the action discretionary?

Unfavorable Personnel Action?

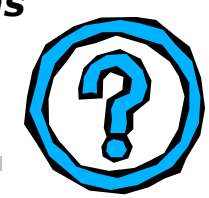
- **1LT Newkirk claims that although his annual performance report had all top-level ratings, the narrative portion did not contain the key "hard-charging" words he feels are needed to remain competitive for future promotion.**

- **SGT Schultz was to attend the Senior Enlisted Academy enroute to his next assignment but was placed on administrative hold pending the outcome of a CID investigation. His NCO Academy slot was subsequently canceled even though the investigation cleared him of all charges.**

Whistleblower Investigations

A Case Study

Personnel Action

- **What if…** 
  - **Responsible official did not consider the personnel action to be “adverse”?**
  - **Personnel action was subsequently reversed?**
  - **Member left the service before the personnel action could have an effect?**

Question Three:

Did management officials <u>responsible</u> for taking, withholding, or threatening the unfavorable personnel action <u>know about</u> the protected communication <u>before</u> they took the unfavorable personnel action?

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Responsible Official Knowledge

Two-step process:

- **Determine who the responsible officials are**
  - ***All* officials for *each* personnel action**

- **Determine if responsible officials knew of the protected communication**
  - ***When* did responsible officials know?**
  - ***What* did responsible officials know?**
  - ***How* did responsible officials find out?**
  - **Did *anyone else* know the responsible officials knew?**

Who is a Responsible Official?

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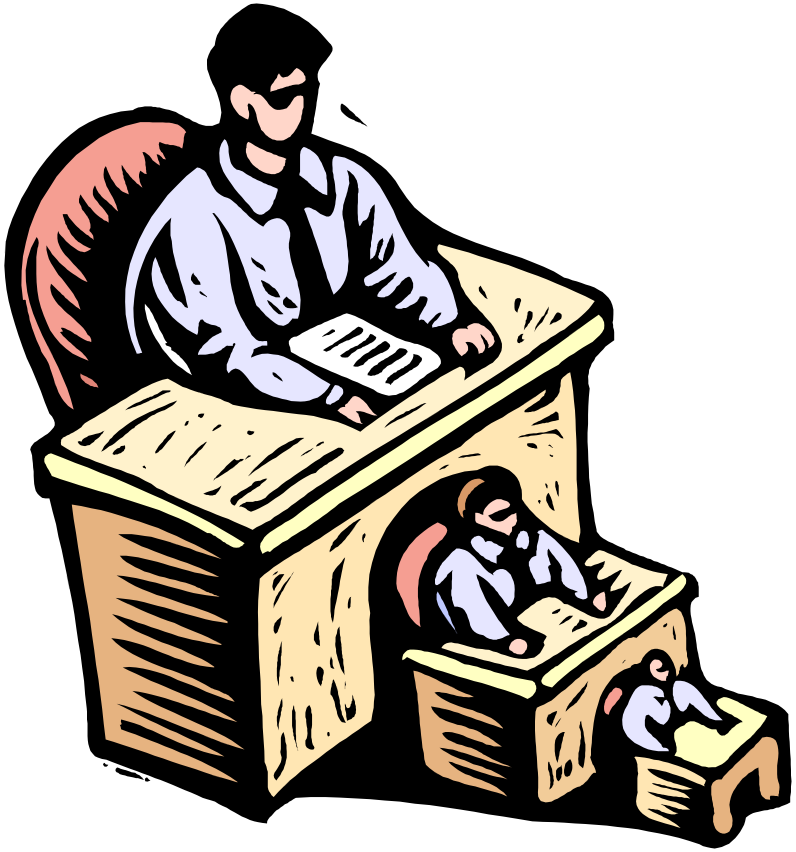

Anyone who:

- **Influenced or recommended the action be taken**
- **Made the decision to take the action**
- **Signed applicable correspondence regarding the action**
- **Approved, reviewed, or endorsed the action**

Responsible Official Knowledge

- ***Timing:***
- **Determine exact date responsible officials:**
  - **First considered taking the action**
  - **Initiated the action (began drafting)**
  - **Completed the action**
  - **First notified the complainant of the action (being considered, in progress, or delivered)**
- **Establish the timing for each personnel action**

Responsible Official Knowledge

Whistleblower Investigations

Knowledge includes:

- **Personally receiving the protected communication**
- **Hearing rumors about the protected communication**
- **Suspicion or belief that the complainant may have made a protected communication**
- **Notes:**
  - **Precise knowledge of the protected communication is not necessary**
  - **Simply being aware that a protected communication occurred (regardless of the subject or content) is sufficient**

Responsible Official Knowledge

- ***Ask the complainant:***
- **"Whom do you believe is responsible?"**
- **"Why do you believe that that person knew you made a protected communication before taking the unfavorable action?"**
- **"Who can testify or provide documents to support your allegation that the responsible officials knew of your protected communication?"**

Responsible Official Knowledge

Ask each responsible official:

- **"When and how did you first become aware of the complainant's protected communications?"**
- **"When and how did you first come to believe or suspect that the complainant may have made (or intended to make) a protected communication?"**

Responsible Official Knowledge

Ask witnesses:

- **"What do you know about the complainant's protected communication, and when did you find out?"**
- **"Did you tell anyone else about the complainant's protected communications and, if so, when?"**

Responsible Official Knowledge

Ask witnesses:

- **"Do you believe that the responsible official knew about the protected communications before he or she took the adverse personnel action? Why?"**
- **"Who else might have information supporting your statement that the responsible officials knew or did not know about the protected communications?"**

Responsible Official Knowledge

What if…

- **Responsible officials deny having any knowledge of the protected communications?**
- **No documentary evidence or corroborating witness testimony exists that the responsible officials knew of the protected communications?**

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Responsible Official Knowledge

If there is any doubt or uncertainty whether the responsible officials knew about the protected communication --

give the complainant the benefit of the doubt

and proceed.

Question Four:

Does a preponderance of the evidence establish that the unfavorable personnel action would have been taken absent the protected communication(s)?

Independent Basis for Personnel Action

- **Documentary evidence**
  - Copy of the unfavorable personnel action
  - Service regulations and policies
  - Other relevant documents
- **Testimonial evidence**
  - Complainant
  - Responsible management officials (RMO)
    - **Anyone who decided, directed, recommended, or influenced the unfavorable personnel action**
  - Other key witnesses

Whistleblower Investigations

Complainant Interview Guidelines

- **Interview complainant first**
- **Verify relevance of documents submitted**
- **Ask what the complainant believes were the responsible official's motives to reprise**
- **Develop new witnesses**
- **Character witnesses**
  - **Relevant to the reprisal?**

Responsible Official Interview Guidelines

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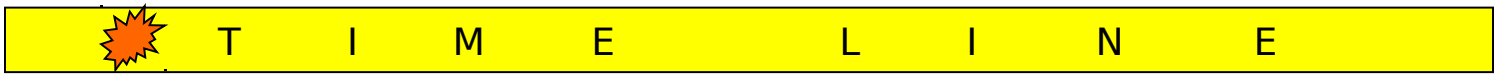
- **Interview all responsible officials**
  - **Anyone who decided, directed, recommended, or influenced**
  - **Any official who signed a document**
- **Establish what events preceded the action**
- **Did the official know of the protected communication?**



RMO Status
Suspect vs. Subject

- **RMOs WILL BE INTERVIEWED AS SUSPECTS (Excludes MHE Procedural RMOs)**

- **DoD Dir 7050.6, Para 4.4., "No person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, in reprisal against any member of the Armed Forces for making or preparing a protected communication."**

- **DoD Dir 7050.6, Para 4.5., "Any violation of paragraph 4.4., above, by a person is subject to Chapter 47 of 10 USC (the Uniform Code of Military Justice, reference (B)), is punishable as a violation of Section 892 of 10 USC (Article 92 of UCMJ "Failure to obey order or regulation"). Civilian employees of the DoD who violate paragraph 4.4., above, shall be subject to disciplinary or adverse action for misconduct pursuant to Chapter 75 of 5 USC (reference (d))."**

A violation of 10 USC 1034 is a violation of a

RMO Status
Suspect vs. Subject

- **Article 31(b) of the UCMJ states: (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that statement made by him may be used as evidence against him in a trial by court-martial.**

- **Military case law has established that an individual must be read his / her Article 31 rights if a person asking the questions is trying to elicit an incriminating response.**

- **You must issue a DA Form 3881 "Rights Warning Procedure/Waiver Certificate"**

IG Records for Adverse Action

Whistleblower Investigations

- **Per AR 20-1 (3-3a), IG Records will not be used as the basis for adverse action against individuals, military or civilian, by directing authorities or commanders except when specifically authorized by TIG (SA, CSA, VCSA)**

- **National Guard falls under State Code of Military Justice unless “Title 10 Status”**

Responsible Official Interview Guidelines (cont'd)

- **What** was the effect of the protected communication on the responsible official?
- **What** factors did the official consider in taking the action?
- **Why** did the action occur when it did?
- Was the action consistent with previous actions?
- **Who** can corroborate the official's testimony?

Other Key Witness Interview Guidelines

- **Corroboration**
- **First-hand observations**
- **Resolve conflicting testimonies**
- **Subject-matter experts**

Overall Interview Guidelines

- **Get answers to all four reprisal questions**
- **Get the "big picture"**
- **Ask the tough questions -- don't hedge or retreat!**

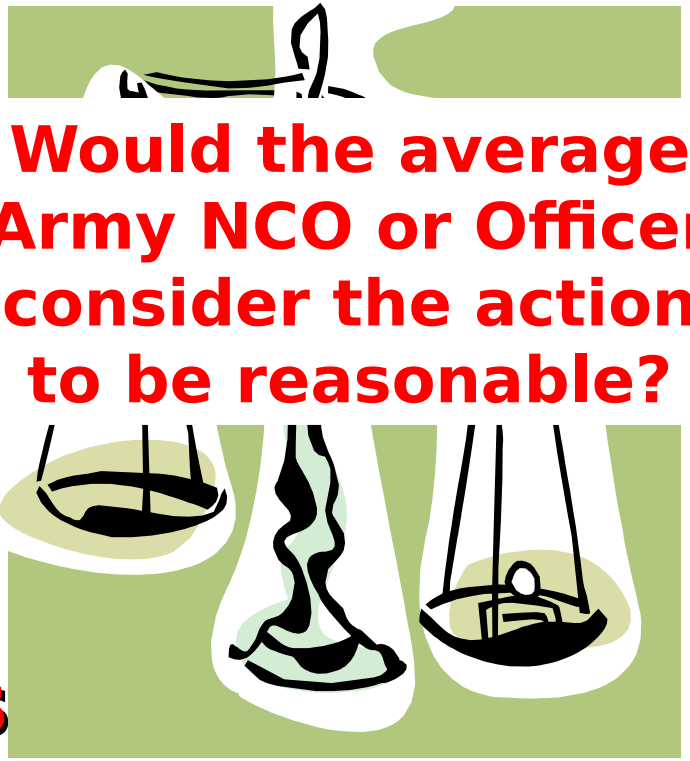
Analyze Evidence and Conclusions

STANDARD: Preponderance of the evidence

- **Evaluate documents and testimony**
  - **What's credible, what's not, and why**
- **Resolve any conflicts**
- **Update chronology**

Unfavorable Personnel Action(s)

- **Consider:**
  - **Reasons**
  - **Procedural correctness**
  - **Consistency with past practice**
  - **Motive**
  - **Reasonableness**



Would the average Army NCO or Officer consider the action to be reasonable?

Motive

- **Did the protected communication adversely affect the responsible official?**
- **Timing -- why did the responsible official take the action at that particular time?**
- **Consider the circumstances in which the action occurred.**
- **Was there evidence of bias against the complainant for "going outside the chain of command?"**
- **Does the responsible official's testimony conflict with other witness testimonies?**

Questions?

ELO

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REPRISAL!